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Nos. 84-809 and 84-1107

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEO RAYMOND MCGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID E. LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' good faith theory of defense was adequately presented in the instructions to the jury.

2. Whether the jury instruction on the mail fraud count impermissibly amended the indictment.

3. Whether the trial court committed prejudicial error in instructing the jury that certain documents in bank loan files constituted "statement[s]" within the meaning of 18 U.S.C. 1005 (No. 84-1107).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 744 F.2d 1197.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on September 21, 1984. A petition for rehearing filed by petitioner Lee was denied on November 9, 1984

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[1]"Pet. App." refers to the appendix to the petition in No. 84-809, unless otherwise indicated.

(84-1107 Pet. App. 19a). The petition for a writ of certiorari in No. 84-809 was filed on November 20, 1984, and the petition in No. 84-1107 was filed on January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted on one count of conspiracy to make false entries in bank records, in violation of 18 U.S.C. 371; 26 counts of causing false entries in bank records, in violation of 18 U.S.C. 1005; and one count of mail fraud, in violation of 18 U.S.C. 1341. Petitioner McGuire was sentenced to concurrent terms of two years' imprisonment on each count. Petitioner Lee was sentenced to concurrent terms of three months' imprisonment on the conspiracy count and two years' imprisonment on the remaining counts, the latter suspended in favor of three years' probation.

1. The evidence at trial[2] showed that petitioner McGuire was president and chief executive officer of the First National Bank of Grayson, Kentucky (FNBG), a federally insured bank; petitioner Lee was a mortgage loan officer at the bank. Petitioners were responsible for overseeing FNBG's participation in a "Loans to Lenders" program instituted in 1979 by the Kentucky Housing Corporation (KHC). Under that program FNBG received $6.5 million at an interest rate of 6.625%, a rate substantially below what the bank normally paid for the use of funds. FNBG was required to loan the KHC funds to qualified low-income borrowers at a below-market interest rate to assist them in

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[2]The description of the evidence at trial is taken from the government's court of appeals brief (at 3-41). Petitioners did not contest the government's statement of facts in their reply briefs filed in the court of appeals.

the purchase of housing; money not distributed in this manner within nine months was to be returned to KHC. Instead of maintaining the KHC funds in a separate account, as the loan agreement required, and using the money for short-term investments until it was to be disbursed as mortgage loans, the bank invested the bulk of the KHC funds in long-term municipal bonds at an interest rate of 12.6%.

FNBG originally was required to return all unused funds to KHC on February 1, 1980. However, because interest rates were rising during this period and bond prices falling, the bank would have lost money on its investment if it had sold the long-term bonds in early 1980. Moreover, the bank was using additional funds to make high-interest investments at a large profit. In order to avoid losing this source of revenue and taking a loss on the sale of the bonds, petitioners obtained an extension of time to and including June 1, 1980, within which the bank could loan the KHC money. By February 29, 1980, the bank had loaned only $2.9 million of the $6.5 million allocated to it.

Petitioners subsequently requested a further extension from KHC, but the request was denied in late May 1980. Instead of returning the $2.65 million of funds still unused on June 1, the bank "loaned" most of the funds during the last days of May 1980, by opening over 80 falsified loan files. Petitioners and other bank employees solicited borrowers, many of whom did not qualify to receive the mortgages.[3] At petitioners' direction, bank employees assured some of the "borrowers" that they did not have to take the money after their loans were approved. Hundreds of identical promissory notes, each dated May 31, as well as truth in lending forms, closing statements, and other essential loan

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[3]The bank did not advertise the availability of the low-income loans to the general public.

documents, were photocopied during this period. Persons other than the purported borrowers, including petitioners, filled in blanks on the bogus loan application forms, in many cases with false entries.

By June 16 FNBG had "loaned" all but $106,000 of the KHC funds. The bank records showed that in May 1980 the bank disbursed almost $3 million in KHC loans. This documentation led KHC to believe that its funds had been properly used for low-interest mortgages. In fact, many of the eleventh-hour "loans" were never "closed." One "borrower" who actually wanted the low-interest mortgage was approved by KHC; however, the bank informed him that his loan had been turned down, and he never received the mortgage for which he had applied.

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-17a). It concluded (*id.* at 2a-6a) that the trial court's failure to give petitioners' requested instruction concerning their "good faith" theory of the case constituted harmless error, since the instructions as a whole clearly placed the issue of good faith before the jury. The court of appeals rejected the claim that the jury instructions improperly sanctioned a nonunanimous verdict (*id.* at 6a-9a). In addition, the court of appeals held that the jury instructions did not impermissibly amend the indictment (*id.* at 9a-10a); that the prosecutor's failure to confront a defense witness with an inconsistent statement did not constitute reversible error (*id.* at 10a-11a); that there was no error in the cross-examination of the defense witnesses (*id.* at 11a-14a); that the trial court did not err in admitting evidence relating to loan applications not mentioned in the indictment (*id.* at 14a-15a) or in refusing to give petitioners' proposed instructions concerning KHC approval of the loans and Kentucky law governing execution of a mortgage (*id.* at 15a); that the trial court acted properly in striking surplusage from the indictment (*id.* at 15a-16a); that an instruction to the jury

that documents in bank loan files constituted "statement[s]" for purposes of 18 U.S.C. 1005 constituted harmless error (Pet. App. 16a); and that the evidence was sufficient to sustain petitioner Lee's conviction (*id.* at 17a).

ARGUMENT

Petitioners raise three challenges to the jury instructions given in this case. None of these contentions warrants review by this Court.

1. Petitioner McGuire contends (84-809 Pet. 6-7) that the trial court erred in failing to give the jury a requested instruction concerning petitioners' good faith defense.[4] He challenges the court of appeals' conclusion (Pet. App. 6a) that the trial court's failure to give the requested instruction constituted harmless error.

Petitioners' good faith defense rested on their claim that they harbored no intent to misuse the Kentucky Housing Corporation funds received by FNBG. Petitioners and other witnesses testified that petitioners consulted with KHC officials in an effort to comply with the regulations (see McGuire C.A. Br. 7-10). McGuire also presented evidence that the bank was led to believe that it would be given further extensions of time, and that when it became clear in late May that the loan money had to be distributed immediately, petitioners attempted to make bona fide loans to qualified applicants in the short amount of time available (*id.* at 8-13).

At the close of trial, petitioners submitted an instruction describing their good faith defense.[5] The trial court declined

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[4]Petitioner Lee adopts McGuire's argument on this point (84-1107 Pet. 15).

[5]The proposed instruction stated (Tr. 3557):

> The defendant has offered evidence of his good faith in making representations alleged in the indictment. Good faith is a complete

to give the requested instruction because it viewed petitioners' good faith defense as merely a variation on their claim that they lacked the requisite specific intent (Tr. 3674-3675). The trial court did give instructions describing at some length the elements of the offenses charged, particularly the element of specific intent (see Pet. App. 3a-5a n.2; Tr. 3915-3920, 3928).[6] The court also referred specifically to petitioners' defense to the charges (Pet. App. 5a n.2; Tr. 3929-3930):

> defense for the crime charged. In determining whether the defendant acted in good faith or with criminal intent, the jury should consider all the facts and circumstances of the case, including evidence of similar activity. If the jury finds that the defendant acted in good faith, he should be found not guilty.

[6]In instructing the jury, the trial court stated, inter alia (Pet. App. 3a-5a n.2):

> To act "with intent to defraud" means to act willfully with intent to deceive or cheat, ordinarily for the purpose of causing financial loss to another or bringing about financial gain to one's self.
>
> Making false entries and conspiring to make false entries in the books and records of a bank are serious crimes which require proof of a specific intent to injure or defraud before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the government must prove that the defendant knowingly did an act which the law forbids purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
>
> * * * * *
>
> To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.
>
> Mail fraud is a serious crime which requires proof of a specific intent to defraud before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
>
> * * * * *

> There is no real dispute that the defendants caused many loan applications to be made, and that there were incorrect statements made in many of them. The defendants, however, presented evidence that they believed that they had a right to act as they did, and that they acted in the belief that they were within their legal rights in view of all of the circumstances as they viewed them.
>
> Again, the matter returns to a determination by you of two main factors in your assessment of the evidence. The first, is, what was the specific intent of the defendants, McGuire and Lee, as they pursued their course of conduct.

The court of appeals correctly concluded that the instructions given by the trial court adequately charged petitioners' good faith theory of defense and that the failure to give the particular instruction sought by petitioners did not warrant reversal of their convictions. Throughout the trial petitioners made clear that good faith was their sole defense; and petitioners' counsel strenuously urged that defense in closing arguments (*e.g.*, Tr. 3762-3764, 3793-3808). The trial court gave detailed instructions on the need for the jury to find specific intent, the issue to which good faith is relevant. The court specifically described petitioners' defense that "they believed that they had a right to act as they did, and that they acted in the belief that they were within their legal rights in view of all of the circumstances as they viewed them" (Pet. App. 5a n.2). The instructions, viewed as a whole and in the context of the trial, left no possibility that the jury did not understand petitioners' theory of defense and the law applicable thereto. See *United States* v. *Fooladi*, 746 F.2d 1027, 1030 (5th Cir. 1984), cert. denied, No. 84-1206 (Feb. 25, 1985).

McGuire contends that the court of appeals' holding with respect to the good faith instruction petitioners requested conflicts with decisions of the Fifth and Tenth Circuits. In fact, there is no true conflict. In *United States* v. *Goss*, 650 F.2d 1336, 1344-1345 (5th Cir. 1981), the court stated that when a defendant alleges good faith and there is an adequate evidentiary basis for that allegation the instruction must "direct the jury's attention to the defense of good faith with sufficient specificity." *Id.* at 1345.[7] In *United States* v. *Fowler*, 735 F.2d 823 (5th Cir. 1984), the court of appeals found fault with the trial court's failure to link its instructions on intent with a good faith theory of defense. *Id.* at 829 n.6. And in *United States* v. *Curry*, 681 F.2d 406, 416-417 (5th Cir. 1982), the court of appeals concluded that the trial court had not adequately instructed the jury on the relationship between the defendant's good faith theory and the charges contained in the indictment. *Id.* at 417 n.29. Here the trial court clearly described petitioners' defense in the course of instructing the jury. In addition, the instructions related petitioners' "belie[f] that they had a right to act as they did" to "a determination by you of * * * what was the specific intent of the [petitioners]" (Pet. App. 5a n.2).

Some of the language in *Goss* suggests that a charge concerning specific intent to defraud can never be an adequate substitute for an instruction that specifically refers to the defense of good faith. However, the Fifth Circuit has

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[7]The court in *Goss* distinguished an earlier decision, *United States* v. *Wilkinson*, 460 F.2d 725, 729 (5th Cir. 1972), on the ground that the trial court in *Wilkinson* "gave an instruction incorporating the good faith defense, although he refused to couch that instruction in the language of the charge offered by the defendant." 650 F.2d at 1345. See also *United States* v. *Lewis*, 592 F.2d 1282, 1286 (5th Cir. 1979) (quoting *United States* v. *Wolfson*, 573 F.2d 216, 221 (5th Cir. 1978)) (" 'a defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense' ").

recently disavowed such a per se rule. In *United States* v. *Fooladi,* 746 F.2d at 1031, the court noted that the rule suggested by *Goss* is inconsistent with other Fifth Circuit decisions under which instructions on specific intent must merely "allow[] the jury to weigh [the defendant's] claim of good faith against the evidence it heard." The court in *Fooladi* limited *Goss* to situations in which the context of the trial and the closing arguments did not make clear the theory of defense. The court affirmed this approach in *United States* v. *Gray,* No. 84-1298 (5th Cir. Jan. 11, 1985), slip op. 2034-2035. Since petitioners' entire defense was predicated on their assertion of good faith, it seems clear the Fifth Circuit would not have reached a result in this case different from that of the court below.

Nor does the decision below conflict with decisions of the Tenth Circuit. In *Steiger* v. *United States,* 373 F.2d 133, 136 (10th Cir. 1967), cited by McGuire, the court concluded that none of the general instructions on intent given in that case "fairly, clearly and fully submitted the defense of good faith" interposed by the defendants in that case. In *United States* v. *Hopkins,* 744 F.2d 716, 718 (10th Cir. 1984) (en banc), the court held that "[t]he 'good faith' instruction is required to be given as a separate subject. Thus instructions on wilfulness, on aspects of intent, on untruth of representations or fraudulent statements are *not* sufficient for this purpose. There must be a full and clear submission of the good faith defense as such." *Ibid.* (emphasis in original). Although the instructions given in this case did not use the words "good faith," they made a "full and clear submission" of petitioners' defense and explained the connection between good faith and the element of specific intent. Indeed, the instructions given by the trial court appear to have presented a clearer statement of the good faith defense than the instruction proffered by petitioners. Thus, the decision

below is not inconsistent with the standard articulated in the Tenth Circuit.[8]

2. Petitioner McGuire next contends (84-809 Pet. 8-13) that in its instructions to the jury the trial court impermissibly amended count 28 of the indictment (the mail fraud count).[9] Count 28 charged that petitioners devised "a scheme and artifice for obtaining money by means of false and fraudulent pretenses, representations, and promises from the Kentucky Housing Corporation, * * * well knowing that said pretenses, promises, and representations were false when made, which scheme and artifice was, in substance, as set out in the following paragraphs of this Count." There followed nine paragraphs describing petitioners' alleged scheme, each of which referred expressly to "the scheme and artifice to defraud." Petitioners requested an instruction limited to a scheme for obtaining money by

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[8]Even if there were a conflict between the decision below and the decisions of the Tenth Circuit, it would not warrant this Court's attention. As we have shown, there is no significant substantive difference between the instructions approved in this case and those required in the Tenth Circuit. Courts and parties in each circuit can readily tailor jury instructions to fit the requirements of the applicable court of appeals authority. Accordingly, the Solicitor General recently decided not to seek certiorari in *Hopkins* because that decision seemed unlikely to create any substantial practical problems for the future.

[9]Petitioner Lee adopts McGuire's argument on this point (84-1107 Pet. 15).

We note that even if petitioners prevailed in their challenge to their mail fraud convictions, it would not affect their sentences. Both McGuire and Lee received concurrent terms of imprisonment on each of the 28 counts on which they were convicted. Even if their convictions on the single mail fraud count were reversed, petitioners' offense severity rating under Parole Commission guidelines (28 C.F.R. 2.20) would not change. Thus, there is no reason for this Court to consider petitioners' challenge to their mail fraud convictions. See, *e.g.*, *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

means of false and fraudulent pretenses. The trial court charged instead that in order to convict petitioners on the mail fraud count the jury was required to find that they "devised a scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, representations or promises" (Tr. 3918).

Petitioners' contention that the trial court's instructions somehow amended the indictment is frivolous. It is well settled that the counts of an indictment are to be read in their entirety and in a common sense manner. See, *e.g.*, *Dunbar* v. *United States,* 156 U.S. 185, 190 (1895); *United States* v. *Chilcote,* 724 F.2d 1498, 1504-1505 (11th Cir. 1984), cert. denied, No. 83-6624 (May 29, 1984); *United States* v. *Ylda,* 643 F.2d 348, 351-352 (5th Cir. 1981). Here count 28, read as a whole, clearly charged a scheme or artifice to defraud. The second paragraph of the count referred to a scheme and artifice for obtaining money by false pretenses, without using the word "defraud." However, the remainder of the count made clear that the grand jury viewed the scheme as one to defraud; indeed, the words "scheme and artifice to defraud" were used in each of the nine paragraphs that described the scheme. Thus, the court's reference to a "scheme or artifice to defraud" did not constitute an amendment of the indictment, but was an accurate reflection of the mail fraud count as a whole.[10]

Petitioners do not dispute the court of appeals' conclusion (Pet. App. 9a-10a) that they were not deprived of notice of the charges against them. Count 28 clearly

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[10]Moreover, the indictment specifically alleged that petitioners violated the mail fraud statute, 18 U.S.C. 1341, which proscribes the use of the mails in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Since the instruction used the words of the statute, it cannot be said to have effected an amendment of the indictment. See *United States* v. *Ylda,* 643 F.2d at 351-352.

informed petitioners that the grand jury was charging them with a scheme to defraud. Petitioners do not claim that they suffered prejudice because they prepared to defend only against allegations that they schemed to obtain property by false pretenses. Moreover, the indictment and the charge to the jury sufficiently protect petitioners against future prosecution for use of the mails in furtherance of the scheme at issue here, whether it is described as a scheme to defraud or a scheme to obtain money by false pretenses. See *Russell* v. *United States,* 369 U.S. 749, 764-766 (1962).

McGuire's citations to *Ex parte Bain,* 121 U.S. 1 (1887), and *Stirone* v. *United States,* 361 U.S. 212 (1960), are inapposite. This Court long ago limited *Bain* to its facts. See *United States* v. *Villamonte-Marquez,* No. 81-1350 (June 17, 1983), slip op. 2 n.2. *Stirone* stands for the proposition that the charges of an indictment may not be broadened significantly by the proof at trial and instructions to the jury when the charges involve an essential element of the crime. There was no broadening of the indictment in this case, since count 28, read as a whole, clearly alleged a scheme to defraud.[11]

3. Petitioner Lee contends (84-1107 Pet. 7-15) that the court of appeals erred in holding that the trial court's indication to the jury that documents in FNBG loan files qualified as "statement[s]" within the meaning of 18 U.S.C. 1005

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[11]Portions of the argument McGuire makes in his petition resemble the contentions of the respondent in *United States* v. *Miller,* No. 83-1750 (argued Jan. 16, 1985), which presents the question whether a mail fraud conviction must be set aside when the fraudulent scheme proved at trial is narrower than the scheme alleged in the indictment. However, there is no need to hold this case pending a decision in *Miller.* The court of appeals in *Miller* based its reversal of the conviction in that case on the prosecution's failure to prove what the court considered to be an essential and substantial part of the factual description of the scheme to defraud alleged in the indictment. *United States* v. *Miller,* 715 F.2d 1360 (1983), modified, 728 F.2d 1269 (9th Cir. 1984). Nothing similar is present here.

did not constitute grounds for reversal of his convictions on those counts. That contention is without merit.

Section 1005 prohibits the making of "any false entry in any book, report, or statement" of a federally insured bank. The purpose of this provision is "to give assurance that upon an inspection of a bank, public officers and others would discover in its books of account a picture of its true condition." *United States* v. *Darby,* 289 U.S. 224, 226 (1933). This Court has construed the provision to cover "any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association." *Agnew* v. *United States,* 165 U.S. 36, 52-53 (1897). The courts of appeals have sustained convictions under Section 1005 in cases involving a wide range of documents. See, *e.g., United States* v. *Hughes,* 726 F.2d 170 (5th Cir. 1984) (credit and debit memos); *United States* v. *Steffen,* 641 F.2d 591, 596-597 (8th Cir.), cert. denied, 452 U.S. 943 (1981) (minute book of the bank's board of directors); *United States* v. *Kennedy,* 564 F.2d 1329, 1341 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978) (loan application memorandum).

In *United States* v. *Foster,* 566 F.2d 1045, 1052 (6th Cir. 1977), cert. denied, 435 U.S. 917 (1978), the court below held that the reference to "book, report, or statement" in Section 1005 "is intended to be broad enough to cover any document or record of the bank that would reveal pertinent information for the officers or directors of the bank." The trial court in this case specifically relied on *Foster* in instructing the jury that the phrase "book, report, or statement" is "not limited to the general ledgers and other formal reports and books of the bank," but includes any record maintained by the bank, "such as the loan application forms of the Kentucky Housing Corporation, the Regulation Z statements, the promissory notes, and settlement statements," if the jury should find that those documents related

to a material matter and were made with intent to deceive or defraud (84-1107 Pet. 5; Tr. 3916).[12] The court of appeals noted that both sides had introduced expert testimony on this issue and that the trial court's instruction may have foreclosed the jury from considering whether the documents at issue were bank statements within the meaning of Section 1005. The court of appeals nevertheless held that, in light of the strong evidence of guilt and the decision in *Foster*, "and inasmuch as the evidence was found where bank records are normally maintained," any error in the instruction was harmless beyond a reasonable doubt. Pet. App. 16a.

The trial court acted properly in instructing the jury that the documents at issue in this case constituted bank "statement[s]" within the meaning of Section 1005. Those documents — loan application forms, Regulation Z statements, promissory notes, and settlement statements — were retained in bank files as records, just as formal financial documents and journals normally are. There was no suggestion that the documents were other than what they purported to be; and the expert witnesses did not differ concerning the meaning of the documents. The parties did not introduce any evidence concerning the documents themselves that would have been relevant to determination of their legal status. The statutory purpose of allowing determination of the true condition of a bank clearly would be

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[12]In explaining to counsel why he intended to instruct the jury that the various documents that had been introduced into evidence were bank records within the meaning of Section 1005, the trial court stated (Tr. 3679):

> * * * I feel bound to give to the jury as law that which the Sixth Circuit says is law. Now if the Sixth Circuit wants to change it, that's the place it ought to be changed and not by testimony or saying it's a jury issue, because it really is not a jury issue. It's a matter of law as to how they interpret that statute and they've interpreted it.

frustrated if documents like the ones in this case could be falsified without any sanctions. In these circumstances, there can be no doubt that the documents constituted bank "statement[s]" within the meaning of Section 1005.

Lee errs in contending (84-1107 Pet. 12) that the decision below conflicts with *United States* v. *Johnson*, 718 F.2d 1317 (5th Cir. 1983) (en banc). In *Johnson*, the defendant was charged with interstate transportation of a falsely made security, in violation of 18 U.S.C. 2314. The trial court instructed the jury that the document in question — a "gold certificate contract" created by the defendant and others —constituted a "security" within the meaning of Section 2314 as a matter of law. The court of appeals concluded that the question whether the document constituted a security was a controverted issue of fact that should have been decided by the jury, rather than by the trial court. 718 F.2d at 1321 n.13. However, it appears to have been significant to the court's decision that the "gold certificate contract" was a unique document that was "vague and ambiguous, experts differed as to its meaning, and facts outside the document, and inferences therefrom, were relevant to the determination of its status." *Id.* at 1325-1326 (Garwood, J., concurring). The court of appeals made clear that such questions would not always be regarded as issues of fact. It explained that the question "whether a generic type of document, such as a traveler's check or an equipment lease, may come within the reach" of the definition of a security "is one of law." *Id.* at 1321 n.13. Unlike the unique document at issue in *Johnson*, the loan documents involved in this case were a "generic type of document," the meaning of which was undisputed.

Nor do the other court of appeals decisions cited by Lee (84-1107 Pet. 12-14) conflict with the decision below. Those decisions arose under statutes other than 18 U.S.C. 1005, and most involved either legal issues that depended on

resolution of an underlying factual controversy or solely questions of fact.[13] In contrast, the legal characterization of the loan documents in this case did not depend on any

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[13]For example, in *United States* v. *Walker*, 677 F.2d 1014, 1016 (4th Cir. 1982), the trial court instructed the jury that the defendant alone had access to certain property, although the defendant had presented evidence of access by others. In *United States* v. *Benedetto*, 558 F.2d 171, 176-177 (3d Cir. 1977), the trial court stated that the jury was required to presume conclusively the state of mind of the defendants from the existence of a very high interest rate.

In *United States* v. *Goetz*, 746 F.2d 705, 707-710 (11th Cir. 1984), cited by Lee, the court of appeals concluded that the trial court committed reversible error when it instructed the jury both that the documents filed by the defendants did not contain any financial information (which appears to have been undisputed) and that, as a matter of law, the documents did not constitute income tax returns. But the case differs from this one in significant respects. First, *Goetz* involved a prosecution under 26 U.S.C. 7203, a different statute from the one at issue here. More important, the trial court in *Goetz* specifically and flatly instructed the jury that, as a matter of law, the actual documents submitted by the defendants were not tax returns; here, the trial court merely indicated in passing (by use of the words "such as") that the documents introduced in evidence in this case would fit the legal description of "statement[s]" within the meaning of Section 1005 (see 84-1107 Pet. 5). The court in *Goetz* might have reached a different result if the charge there had taken the more circuitous form of the instruction in this case. Moreover, in *Goetz* the trial court's refusal to allow the defendants to present a good faith defense independently required reversal; thus, the court of appeals' suggestion that the jury instruction in that case could not be treated as harmless error constituted dictum. Here petitioners had a full opportunity to present their good faith defense (see pages 5-7, *supra*); and the court of appeals was able to conclude that the error it perceived in the jury instruction was "harmless beyond a reasonable doubt" (Pet. App. 16a). Finally, any inconsistency in the analytical approaches of *Goetz* and this case appears to be of relatively little practical importance. Under *Goetz*, the jury presumably could be instructed in some detail concerning the type of document that generally would fall within the statutory definition; at least in the case of standard kinds of documents, the jury's ultimate finding would involve a straightforward application of the legal standard. In virtually all such cases, the jury would reach the same result under either the sort of instruction prescribed by *Goetz* or the type of instruction given here.

disputed issue of fact. Thus, there is no reason to believe that any other court of appeals would have arrived at a result different from that reached by the court below.[14]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[14]Lee implies that the challenged jury instruction had the effect of directing a verdict on the issue of specific intent because the government's expert witness commented that, in his view, false entries connoted an intent to defraud. See 84-1107 Pet. 10-11. The record does not support Lee's contention. The trial court stated in the course of the challenged instruction that the jury was required to address the question whether any false entry was "made with intent to deceive or defraud." See Tr. 3916. At other points during the jury instructions, the trial court carefully stressed that the jury was required to decide whether petitioners acted with specific intent to defraud or deceive. See pages 6-7 & note 6, *supra*. Under these circumstances, the jury could not possibly have interpreted the trial court as instructing it to find specific intent as a matter of law.